

NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION

Madeleine Clayton 10/22/2001
Departmental Forms Clearance Officer
Office of the Chief Information Officer
14th and Constitution Ave. NW.
Room 6086
Washington, DC 20230

In accordance with the Paperwork Reduction Act, OMB has taken the following action on your request for approval of a revision of an information collection received on 08/23/2001.

TITLE: Limits on Application of Take Prohibitions

AGENCY FORM NUMBER(S): None

ACTION : APPROVED

OMB NO.: 0648-0399

EXPIRATION DATE: 03/31/2003

BURDEN	RESPONSES	BURDEN HOURS	BURDEN COSTS
Previous	184	2,180	3
New	224	2,680	4
Difference	40	500	1
Program Change		500	1
Adjustment		0	0

TERMS OF CLEARANCE: None

NOTE: The agency is required to display the OMB control number and inform respondents of its legal significance (see 5 CFR 1320.5(b)).

OMB Authorizing Official Title

Donald R. Arbuckle Deputy Administrator, Office of
Information and Regulatory Affairs

PAPERWORK REDUCTION ACT SUBMISSION

Please read the instructions before completing this form. For additional forms or assistance in completing this form, contact your agency's Paperwork Clearance Officer. Send two copies of this form, the collection instrument to be reviewed, the supporting statement, and any additional documentation to: Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.

1. Agency/Subagency originating request	2. OMB control number b. <input type="checkbox"/> None a. _____ - _____
3. Type of information collection (<i>check one</i>) a. <input type="checkbox"/> New Collection b. <input type="checkbox"/> Revision of a currently approved collection c. <input type="checkbox"/> Extension of a currently approved collection d. <input type="checkbox"/> Reinstatement, without change, of a previously approved collection for which approval has expired e. <input type="checkbox"/> Reinstatement, with change, of a previously approved collection for which approval has expired f. <input type="checkbox"/> Existing collection in use without an OMB control number For b-f, note Item A2 of Supporting Statement instructions	4. Type of review requested (<i>check one</i>) a. <input type="checkbox"/> Regular submission b. <input type="checkbox"/> Emergency - Approval requested by _____ / _____ / _____ c. <input type="checkbox"/> Delegated 5. Small entities Will this information collection have a significant economic impact on a substantial number of small entities? <input type="checkbox"/> Yes <input type="checkbox"/> No 6. Requested expiration date a. <input type="checkbox"/> Three years from approval date b. <input type="checkbox"/> Other Specify: _____ / _____
7. Title	
8. Agency form number(s) (<i>if applicable</i>)	
9. Keywords	
10. Abstract	
11. Affected public (<i>Mark primary with "P" and all others that apply with "x"</i>) a. <input type="checkbox"/> Individuals or households d. <input type="checkbox"/> Farms b. <input type="checkbox"/> Business or other for-profit e. <input type="checkbox"/> Federal Government c. <input type="checkbox"/> Not-for-profit institutions f. <input type="checkbox"/> State, Local or Tribal Government	12. Obligation to respond (<i>check one</i>) a. <input type="checkbox"/> Voluntary b. <input type="checkbox"/> Required to obtain or retain benefits c. <input type="checkbox"/> Mandatory
13. Annual recordkeeping and reporting burden a. Number of respondents _____ b. Total annual responses _____ 1. Percentage of these responses collected electronically _____ % c. Total annual hours requested _____ d. Current OMB inventory _____ e. Difference _____ f. Explanation of difference 1. Program change _____ 2. Adjustment _____	14. Annual reporting and recordkeeping cost burden (<i>in thousands of dollars</i>) a. Total annualized capital/startup costs _____ b. Total annual costs (O&M) _____ c. Total annualized cost requested _____ d. Current OMB inventory _____ e. Difference _____ f. Explanation of difference 1. Program change _____ 2. Adjustment _____
15. Purpose of information collection (<i>Mark primary with "P" and all others that apply with "X"</i>) a. <input type="checkbox"/> Application for benefits e. <input type="checkbox"/> Program planning or management b. <input type="checkbox"/> Program evaluation f. <input type="checkbox"/> Research c. <input type="checkbox"/> General purpose statistics g. <input type="checkbox"/> Regulatory or compliance d. <input type="checkbox"/> Audit	16. Frequency of recordkeeping or reporting (<i>check all that apply</i>) a. <input type="checkbox"/> Recordkeeping b. <input type="checkbox"/> Third party disclosure c. <input type="checkbox"/> Reporting 1. <input type="checkbox"/> On occasion 2. <input type="checkbox"/> Weekly 3. <input type="checkbox"/> Monthly 4. <input type="checkbox"/> Quarterly 5. <input type="checkbox"/> Semi-annually 6. <input type="checkbox"/> Annually 7. <input type="checkbox"/> Biennially 8. <input type="checkbox"/> Other (describe) _____
17. Statistical methods Does this information collection employ statistical methods <input type="checkbox"/> Yes <input type="checkbox"/> No	18. Agency Contact (person who can best answer questions regarding the content of this submission) Name: _____ Phone: _____

19. Certification for Paperwork Reduction Act Submissions

On behalf of this Federal Agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9

NOTE: The text of 5 CFR 1320.9, and the related provisions of 5 CFR 1320.8(b)(3), appear at the end of the instructions. *The certification is to be made with reference to those regulatory provisions as set forth in the instructions.*

The following is a summary of the topics, regarding the proposed collection of information, that the certification covers:

- (a) It is necessary for the proper performance of agency functions;
- (b) It avoids unnecessary duplication;
- (c) It reduces burden on small entities;
- (d) It used plain, coherent, and unambiguous terminology that is understandable to respondents;
- (e) Its implementation will be consistent and compatible with current reporting and recordkeeping practices;
- (f) It indicates the retention period for recordkeeping requirements;
- (g) It informs respondents of the information called for under 5 CFR 1320.8(b)(3):
 - (i) Why the information is being collected;
 - (ii) Use of information;
 - (iii) Burden estimate;
 - (iv) Nature of response (voluntary, required for a benefit, mandatory);
 - (v) Nature and extent of confidentiality; and
 - (vi) Need to display currently valid OMB control number;
- (h) It was developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected (see note in Item 19 of instructions);
- (i) It uses effective and efficient statistical survey methodology; and
- (j) It makes appropriate use of information technology.

If you are unable to certify compliance with any of the provisions, identify the item below and explain the reason in Item 18 of the Supporting Statement.

Signature of Senior Official or designee

Date

Agency Certification (signature of Assistant Administrator or head of MB staff for L.O.s, or of the Director of a Program or Staff Office)	
Signature	Date
Signature of NOAA Clearance Officer	
Signature	Date

SUPPORTING STATEMENT
Limits on Application of Take Prohibitions - Threatened Salmonids
OMB CONTROL NO. 0648-0399

A. JUSTIFICATION

1. Explain the circumstances that make the collection of information necessary.

Section 4(d)¹ of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 et. seq.) requires the National Marine Fisheries Service (NMFS) to adopt such regulations as it “deems necessary and advisable to provide for the conservation of” threatened species. Those regulations may include any or all of the prohibitions provided in section 9(a)(1) of the ESA, which specifically prohibits “take” of any endangered species (“take” includes actions that harass, harm, pursue, kill, or capture). There are now 21 separate Evolutionarily Significant Units (ESUs) of west coast salmonids listed as threatened, covering a large percentage of the land base in California, Oregon, Washington and Idaho. The first 4 salmonid species listed by NMFS as threatened were protected by virtually blanket application of the section 9 take prohibitions. On July 10, 2000, NMFS issued a final rule (July 2000 rule) which makes section 9 prohibitions generally applicable to fourteen of those threatened ESUs except in 14 programs and circumstances. NMFS is obligated to enact necessary and advisable protective regulations for the remaining 3 ESUs currently without protections.

In the attached proposed 4(d) rule, NMFS makes section 9 prohibitions generally applicable to the remaining 3 threatened ESUs without protections in place, and amends existing protective regulations for another ESU all of which occur in California. The proposed rule also seeks to respond to requests from entities within California to both provide more guidance on how to protect threatened salmonids and avoid take, and to limit the application of take prohibitions wherever warranted. The proposed regulations describe 10 programs or circumstances that contribute to the conservation of, or are being conducted in a way that adequately limits impacts on, listed salmonids. The proposed regulations do not apply the take prohibitions to those programs and circumstances. Certain of these 10 limits on the take prohibitions entail voluntary submission of a plan to NMFS and/or annual or occasional reports by entities wishing to take advantage of these limits, or continue within them.

Each of the 10 limits applies to a different sector of activity, and to different potential populations of responders. Those dealing with aiding sick or stranded salmonids, fish harvest, artificial propagation, scientific research, and habitat restoration are available only to the State of California. Hence, any submission of plans or reports associated with those sectors of activity

¹ Section 4(d) of the Endangered Species Act, 16 U.S.C. et seq., states:
“Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1)”

will not involve submission by 10 or more respondents. The sectors for which there might be 10 or more respondents annually include diversion screening, Oregon Department of Transportation's (ODOT's) Routine Road Maintenance program in which cities and counties may adopt the ODOT's program or submit an equally protective program, and urban development. A brief description of each follows, and the burdens associated with each of these is discussed below (see ## 12-14).

Diversion Screening Limit: Water diversion structures (gravity flow or pumps) that have not been screened to prevent fish from being injured or diverted into fields is a significant source of injury and mortality to listed salmonids, particularly to juveniles. State laws and Federal programs have long recognized these problems in varying ways, and encouraged or required adequate screening of diversion ditches, structures, and pumps to prevent much of the anadromous fish loss attributable to this cause. Nonetheless, large numbers of diversions are not adequately screened and elimination of that source of injury or death is vital to conservation of listed salmonids. The limit proposed in this rule should prompt diverters to move quickly to provide adequate screening or other protections for their diversions, because once so screened, take prohibitions would not apply. The diversion must be screened in accord with NMFS' Southwest Region "Fish Screening Criteria for Anadromous Salmonids, January 1997" or any subsequent revision (available by contacting NMFS). The operator would need to provide documentation for the screening installed, including plans, for a written acknowledgment from NMFS' engineering staff or designated agent that the screens are in compliance with the above criteria. There are no ongoing reporting requirements associated with this limit.

Routine Road Maintenance: This limit would be available to the State of California or any city, county or port therein, provided that: (1) they are conducted by the employees or agents of the state or any county, city, or port under a program that is substantially similar to that contained in the ODOT Guide or under a program that has been determined by NMFS to meet or exceed the protections provided by the ODOT guide, or that (2) they are conducted by employees or agents of the State or any county, city, or port in a manner that has been found by NMFS to contribute to properly functioning habitat conditions for the threatened salmonid ESUs considered in this proposed rule. The city or county would need to prepare an agreement detailing how it will assure adequate training and compliance with the ODOT or equivalent guidance, and describing any dust abatement practices it wishes to be within the limit. There are no ongoing reporting requirements associated with this limit.

The ODOT guide governs the manner in which crews should proceed on a wide variety of routine maintenance activities, including surface and shoulder work, ditch, bridge, and culvert maintenance, snow and ice removal, emergency maintenance, mowing, brush control and other vegetation management. The program directs activity toward favorable weather conditions, increases attention to erosion control, prescribes appropriate equipment use, governs disposal of vegetation or sediment removed from roadsides or ditches, and includes other improved protections for listed salmonids, as well as improving habitat conditions generally. Routine road maintenance conducted in compliance with the ODOT program or an equivalent program will adequately address the problems potentially associated with such activity.

Urban Development: This limit would be available to any city or county affected by the take prohibitions, if it has land development ordinances in a sufficiently comprehensive form that they could satisfy the criteria set out in the regulation. The jurisdiction would need to provide NMFS with copies of those comprehensive ordinances, and provide any necessary explanatory materials showing how the ordinances meet those standards.

Once a jurisdiction's ordinances have been found adequate to be within a limit on take prohibitions, it would need to prepare an annual report, including gathering, reproducing, and submitting available water quality data, aerial photographs, storm water data, etc.

Reports of Salmonids Assisted, Disposed of, or Salvaged: Employees or designees of the State of California, Tribes or other governmental entities in California with co-management authority over listed species may, in the course of their duties, take a threatened salmonid if such an action is necessary: (1) to aid a sick, injured, or stranded salmonid, (2) to dispose of a dead salmonid, or (3) to salvage a dead salmonid for scientific study. Each agency acting under this limit on the take prohibition must annually report to NMFS on the numbers of fish handled and their status.

2. Explain how, by whom, how frequently, and for what purpose the information will be used.

NMFS will review plans submitted to determine whether they provide sufficient biological protections to warrant not applying the take prohibitions to activities governed by that plan. NMFS' biologists will review the plans against the criteria associated with the applicable limit on take prohibitions. Those criteria have been carefully crafted to assure that plans meeting them will adequately limit impacts on threatened salmonids, such that additional protections in the form of a federal take prohibition are not necessary and advisable. The practical utility of these submissions is that, assuming a plan or program is found to meet the criteria associated with the particular limit in the 4(d) rule, the state or other entity submitting the plan, and individuals acting in compliance with the plan, can carry on with their activity knowing that they are in full compliance with the ESA and need not be concerned with any possibility of ESA enforcement.

The annual reporting associated with the urban development limit focuses on data that would be in the possession of the jurisdictions and would aid NMFS in understanding the cumulative impacts of development on habitat within the listed ESUs, and to determine whether additional protections are required to provide for the conservation of the species (or, alternatively, whether some additional limits on federal protections may be warranted).

The annual reporting associated with salmonids that were aided, disposed of, or salvaged provides NMFS with the numbers of threatened salmonids being affected by such actions. This information is necessary as part of the tracking of the status of the affected threatened species.

The ranges of the ESUs contained in this proposed rule overlap substantially with the ESUs contained in the July 4(d) rule. However, the July rule became effective on September 8, 2000, and on January 8, 2001, for the steelhead and salmon ESUs respectively. Reporting

requirements are at the minimum on an annual basis or as NMFS deems appropriate per the July rule. NMFS approved the first plan under the July rule in June 2001 and, therefore, does not yet have any required information from the entities conducting the activities.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological techniques or other forms of information technology.

Any collection of information associated with the 4(d) rule is voluntary. There is no form involved. The rule does not require any particular method of submission of plans or reports; as a matter of course, any such information would be accepted in electronic form.

4. Describe efforts to identify duplication.

NMFS has not identified any examples where this rule involves duplication with other collections of information. This information collection is unique. As NMFS gains experience with this approach to 4(d) protections, it is likely that many of the plans or reports submitted may serve to relieve the take prohibitions for an even broader range of listed species.

Although the ranges of the ESUs contained in this proposed rule overlap considerably with the ranges of the ESUs contained in the July 4(d) rule, this proposed rule is applicable to 3 ESUs that previously had no take prohibitions in place and did not require reporting. In the absence of 4(d) rules, NMFS provides ESA coverage through section 10 research, enhancement, and incidental take permits with private entities, or through section 7 consultation with Federal agencies as in the case of the ESU that currently has a take prohibition in place. The section 7 and section 10 processes have their own specific reporting requirements associated with them. Modifying the existing take prohibitions for coho will not duplicate reporting requirements since the take limits contained in this proposed rule offer an alternative to the section 7 and section 10 processes.

5. If the collection of information involves small businesses or other small entities, describe the methods used to minimize burden.

None of these collections will have a significant economic impact on small entities. Any economic impact of these rules flows from the application of the take prohibition in the first instance, which has no associated collection of information.

6. Describe the consequences to the Federal program or policy activities if the collection is not conducted or is conducted less frequently.

If NMFS were not to provide the opportunity for entities to seek a limit on take prohibitions, those entities would in all cases remain subject to the take prohibitions. Before embarking on activity that may impact threatened salmonids, those entities would need to assess the risk of actual take, and determine whether to seek an ESA section 10 permit. Unless the entity procured a section 10 permit or a completed ESA section 7 consultation, the entity would remain at risk of

ESA enforcement for violation of the take prohibitions. Annual reporting on urban development programs is necessary to monitor the effectiveness of the protections provided. Less than annual reporting would hinder NMFS' ability to conserve listed species.

7. Explain any special circumstances that require the collection to be conducted in a manner inconsistent with OMB guidelines.

Not Applicable. This collection is consistent with the guidelines.

8. Provide a copy of the PRA Federal Register notice that solicited public comments on the information collection prior to this submission. Summarize the public comments received in response to that notice and describe the actions taken by the agency in response to those comments. Describe the efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

Public comment on these information collections will be solicited in the proposed 4(d) rule Federal Register notice. There were no comments submitted regarding information collection on the July 2000 rule. In crafting the proposed limits on take prohibitions, NMFS has worked with a subset of the potential users of those limits. For instance, fisheries biologists have discussed the criteria and processes for the limits related to fish harvest or artificial propagation with representatives of state fish and wildlife agencies.

9. Explain any decisions to provide payments or gifts to respondents, other than remuneration of contractors or grantees.

No payments, gifts or remuneration are associated with these voluntary collections of information.

10. Describe any assurance of confidentiality provided to respondents and the basis for assurance in statute, regulation, or agency policy.

There are no assurances of confidentiality associated with these voluntary collections of information. The information supplied would be a matter of public record.

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

No sensitive questions are asked.

12. Provide an estimate in hours of the burden of the collection of information.

The following burden hour estimates are just that- estimates since NMFS has yet to receive reports from entities seeking ESA coverage per the July 2000 rule. These estimates can be revised after submittal of reports and information on actual burden hours. Likewise, the numbers of entities seeking a limit on take prohibitions will be influenced by many factors including the status of other programs (e.g., diversion screening programs run by individual states), individual circumstances and risk assessments, and citizen reaction to this approach to ESA regulation.

Since the ESUs' ranges covered in the July 2000 rule covers virtually all of the ESUs' ranges of this proposed rule, the estimates of the numbers of responders (23), the burden hours (23 responders *30 hours/response =690 burden hours annually) for the urban development limit are not expected to change since that limit on the prohibitions is already available to all cities and counties in California. There are also burden hours associated with preparing and submitting and submitting an annual report for the urban development limit (10 burden hours*23 annual reports=230 burden hours annually). The 230 burden hours are also not expected to change.

The number of responders (20) and the number of burden hours (20 responders*5 hours to collect and report information=100 hours annually) for the aided, disposed of, or salvaged salmonids limit will also not change because that limit is already available to all eligible agencies and other entities in California.

The burden hour estimates for the screening diversion limit and the routine road maintenance limit are expected to increase.

Diversion Screening Limit: The revised estimated number of individuals or entities seeking this limit over the coming three years is 60 (an average of 20 per year). To come within this limit, a water diversion operator would need to assemble and reproduce documentation, including plans for the screening device installed (3 hours); and submit that documentation to NMFS (1 hour); respond to any questions (1 hour). That is a one time process, amounting to 5 hours per respondent, or a total of 100 burden hours per year.

Routine Road Maintenance: This limit is available to cities (153) and counties (24) in California that are within the geography of one or more of the ESUs in this proposed rule. NMFS estimates that a maximum of 1/3 of these local governments may decide to follow the Oregon Department of Transportation guidance or develop an equivalent program and seek to come within the limit on take prohibitions over the next three years. Each of those governmental units would need to prepare an agreement detailing how it will assure adequate training and compliance with the ODOT or equivalent program guidance, and describing any dust abatement practices it wishes to be within the limit.

This process would include discussions with NMFS, drafting, and submittal of the agreement, estimated to require between 10 and 30 hours per jurisdiction, for an average of 20 hours. Thus,

1200 burden hours are potentially associated with this collection if an average of 20 jurisdictions were to submit in each of the first three years, with an annual average of 400 burden hours.

13. Provide an estimate of the total annual cost burden to the respondents or record-keepers resulting from the collection.

There would be no known startup or capital costs associated with the collections described above. There would be some reproduction, shipping, and records management costs associated with the road maintenance and diversion screening limits. Reproduction costs for road maintenance agreements would be minimal (maximum \$2 each), and mailing likewise (maximum \$2). Assuming an average of 20 submissions per year, total O&M costs would be \$80. Each diversion screening submission would average \$10.00 for reproduction of plans and explanations (\$3 per page of plans and \$0.10 per page of text), and \$4 for shipping. Assuming an average of 20 submissions per year, this would result in annual total O&M of \$280 annually.

Mailing and postage costs for reports on aiding, disposing of, or salvaging salmon would average about \$1 a submission, for an annual total of \$20 annually, however no additional respondents are expected due to this proposed rule.

Urban development packages could average as much as 500 pages each, for a reproduction cost of \$50 per package. Assuming a mailing cost of \$10 per package, an annual average of 23 submissions would total \$1,380. Annual reports would also include an aerial photo and perhaps other graphic portrayals (\$10-20), plus up to 20 standard text pages. Assuming shipping cost of \$4, total per submission would be \$21, with an annual total of \$483. No additional respondents are expected due to this proposed rule.

14. Provide estimates of annualized cost to the Federal government.

Costs to the Federal government associated with these collections are the wage costs for biologists who will evaluate the submissions. These costs however would be incurred with or without the associated collections of information. Without the collection of information associated with these 4(d) regulations, NMFS biologists would deal with increased numbers of section 10/HCP applications, enforcement situations, and requests for assistance to the public in determining risks of impacting threatened salmonids in the course of a variety of activities.

15. Explain the reasons for any program changes or adjustments reported in Items 13 or 14 of the OMB 83-I.

These are revised requirements. NMFS is proposing regulations to implement the take prohibitions except for specific categories of activities for 3 salmonid ESUs and also a modification of the take prohibitions for another salmonid ESU. Members of the public who were not affected by the July 2000 rule but will be affected by these proposed regulations and who choose to apply for ESA coverage under one of the take limitations will be subjected to the reporting requirements.

16. For collections whose results will be published, outline the plans for tabulation and publication.

There are no plans to publish the data.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons why display would be inappropriate.

Not seeking such approval.

18. Explain each exception to the certification statement identified in Item 19 of the OMB 83-I.

There are no exceptions to the certification requirement. The submission does not indicate the retention period for record keeping requirements, since the rules do not specify any retention period.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS.

Not applicable. The collection will not employ statistical methods.

Additional Cost to Public					
	Road Maintenance Agreements	Diversion Screening	Urban Development packages/ reports	Reports of Aided, Salvaged, Disposed of Salmonids	TOTALS
Annual # of Responses	20	20	0/0	0	40
Number of Hours per Response	20	5	30/10	5	
Total Hours (Annually)	400	100	0/0	0	500
Cost per Response (@ \$18/hr)	\$360	\$90			
Burden Hour Costs (Annual)	7200	\$1,800	\$0/0	\$0	\$9,000
O&M Costs (Annual)	\$80	\$280			\$360
Annual Total	\$7,280	\$2,080	\$0/0	\$0	\$9,360
Cost to Government					
Processing: Federal Government Hours per Response	20	15	0/0	0	
Total Hours (Annually)	400	300	0/0	0	700
Cost per Response (@ \$18/hr)	\$360	\$270			
Total Cost (Annually)	\$7,200	\$5,400	\$0	\$0	\$12,600

Sec. 1533. Determination of endangered species and threatened species

- (a) Generally
 - (1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:
 - (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
 - (B) overutilization for commercial, recreational, scientific, or educational purposes;
 - (C) disease or predation;
 - (D) the inadequacy of existing regulatory mechanisms; or
 - (E) other natural or manmade factors affecting its continued existence.
 - (2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970 -
 - (A) in any case in which the Secretary of Commerce determines that such species should -
 - (i) be listed as an endangered species or a threatened species, or
 - (ii) be changed in status from a threatened species to an endangered species,
he shall so inform the Secretary of the Interior; who shall list such species in accordance with this section;
 - (B) in any case in which the Secretary of Commerce determines that such species should -
 - (i) be removed from any list published pursuant to subsection (c) of this section, or
 - (ii) be changed in status from an endangered species to a threatened species,
he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and
 - (C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.
 - (3) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable -
 - (A) shall, concurrently with making a determination under

paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and
 (B) may, from time-to-time thereafter as appropriate, revise such designation.

- (b) Basis for determinations

- (1)

- (A) The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction; or on the high seas.
- (B) In carrying out this section, the Secretary shall give consideration to species which have been -
 - (i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or
 - (ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

- (2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

- (3)

- (A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section [553](#)(e) of title 5, to add a species to, or to remove a species from, either of the lists published under subsection (c) of this section, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the

status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

- (B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:
 - (i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.
 - (ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).
 - (iii) The petitioned action is warranted, but that -
- (I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and
- (II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary, in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.
- (C)
 - (i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.
 - (ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.
 - (iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7 [11](#) to prevent a significant risk to the well being of any such species.
- (D)
 - (i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section [553](#)(e) of title 5, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.
 - (ii) Within 12 months after receiving a petition that is found under clause (i) to

present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

- (4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section [553](#) of title 5 (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this chapter.
- (5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall -
 - (A) not less than 90 days before the effective date of the regulation -
 - (i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and
 - (ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county, or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;
 - (B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;
 - (C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;
 - (D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and
 - (E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.
- (6)
 - (A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register -
 - (i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either -
 - (I) a final regulation to implement such determination,

- (II) a final regulation to implement such revision or a finding that such revision should not be made,
- (III) notice that such one-year period is being extended under subparagraph (B)(i), or
- (IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or
 - (ii) subject to subparagraph (C), if a designation of critical habitat is involved, either -
- (I) a final regulation to implement such designation, or
- (II) notice that such one-year period is being extended under such subparagraph.
- (B)
 - (i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.
 - (ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.
 - (iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.
- (C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that -
 - (i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or
 - (ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one

additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

- (7) Neither paragraph (4), (5), or (6) of this subsection nor section [553](#) of title 5 shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if -
 - (A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and
 - (B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur. Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.
- (8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this chapter shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.
- (c) Lists
 - (1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b) of this section.
 - (2) The Secretary shall -

- (A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and
- (B) determine on the basis of such review whether any such species should -
 - (i) be removed from such list;
 - (ii) be changed in status from an endangered species to a threatened species; or
 - (iii) be changed in status from a threatened species to an endangered species. Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b) of this section.

- (d) Protective regulations

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section [1538\(a\)\(1\)](#) of this title, in the case of fish or wildlife, or section [1538\(a\)\(2\)](#) of this title, in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section [1535\(c\)](#) of this title only to the extent that such regulations have also been adopted by such State.

- (e) Similarity of appearance cases

The Secretary may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to this section if he finds that -

- (A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;
- (B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and
- (C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this chapter.

- (f) Recovery plans

- (1) The Secretary shall develop and implement plans (hereinafter in this subsection

referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable -

- (A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;
- (B) incorporate in each plan -
 - (i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;
 - (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and
 - (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

- (2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.
- (3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.
- (4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.
- (5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).

- (g) Monitoring

- (1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this chapter are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c) of this section.
- (2) The Secretary shall make prompt use of the authority under paragraph 7 [\[2\]](#) of subsection (b) of this section to prevent a significant risk to the well being of any such

recovered species.

- (h) Agency guidelines; publication in Federal Register; scope; proposals and amendments: notice and opportunity for comments

The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to -

- (1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;
- (2) criteria for making the findings required under such subsection with respect to petitions;
- (3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this section; and
- (4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section. The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

- (i) Submission to State agency of justification for regulations inconsistent with State agency's comments or petition

If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) of this section files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3) of this section, the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.

Footnotes

[\[1\]](#) So in original. Probably should be paragraph "(7)".

[\[2\]](#) So in original. Probably should be paragraph "(7)".